IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2014-404-3355
[2019] NZHC 532

UNDER	Receiverships Act 1993 s 34(1) and s 284(1) of the Companies Act 1993
IN THE MATTER OF	Capital + Merchant Finance Limited (In Receivership and Liquidation)
BETWEEN	BRENDON JAMES GIBSON and GRANT ROBERT GRAHAM Applicants
AND	OFFICIAL ASSIGNEE First respondent
	FORTRESS CREDIT CORPORATION (AUSTRALIA) II PTY LIMITED Second respondent
	PERPETUAL TRUST LIMITED Third respondent

Hearing:	11-14 March 2019
Appearances:	R B Stewart QC, M D Arthur, and S R Holden for the applicants C T Gudsell QC and R J Southall for the first respondent
Judgment:	21 March 2019

JUDGMENT OF JAGOSE J

This judgment is delivered by me on 21 March 2019 at 4.30 pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Counsel/Solicitors:
Robert Bruce Stewart QC, Auckland
Chapman Tripp, Auckland
C T Gudsell QC, Hamilton
R J Southall, Barrister, Hamilton

[1] In 2015, with the consent of the parties, this Court made interlocutory orders essentially disposing of the proceeding. The proceeding was the receivers' originating application for directions in the liquidation and receivership of Capital + Merchant Finance Limited (the "Company"), in which the Official Assignee was the liquidator.

[2] The Official Assignee had secured $18.5m ("including GST, if any") in settlement of the Company's claim against its former auditors. The Official Assignee claimed reimbursement of his consequent expenses (or 'salvage costs') from that fund, and the second and third respondents also claimed entitlement to payments from the fund.

[3] By consent, this Court directed the Official Assignee to retain specified funds to meet the other respondents' claims (if established), to pay himself "in resolution" of his own expenses claim, and to pay the remainder of the fund to the receivers. That was done, the receivers returning the net balance to the Company's investors.

[4] The Court's order included provision for further agreement or Court orders in relation to the retentions, which the Official Assignee expected to abide. Thus disposition of the whole of the fund was addressed. The second and third respondents' claims ultimately were resolved for amounts less than the retentions, leaving the balance of the fund with the Official Assignee.

[5] It since has become apparent the settlement payment may impose a GST liability. There is at least a possibility that liability may fall on the Official Assignee. The Official Assignee disputes both, incurring further expenses in doing so.

[6] Recognising – in the words of the Official Assignee's counsel, Christopher Gudsell QC – the 'fortuity' of his continued retention of the balance of the fund, the Official Assignee now seeks to have resort to it also to meet any such liability and expenses (including on its present application, essentially to vary this Court's 2015 orders). The receivers, meanwhile, have amended their originating application, now for directions the Official Assignee also pay the retained balance to them.

[7] The primary issue for my determination is whether I should set aside the consent orders, which in large part have been performed. The matter is complicated by the Official Assignee's wish I only vary the orders to the extent sought, and the receivers' contention the orders embody their contractual resolution of the Official Assignee's claim to salvage costs. Although I have extensive discretion to grant relief from contractual mistakes, including by cancelling or varying the subject contract, the receivers say the circumstances do not qualify as such a 'mistake', but setting aside or varying the consent orders would effectively be to cancel or vary their contract.

Factual background

—parties

[8] The Company was a finance company, raising money from the public, primarily for property development. The third respondent ("Perpetual") was appointed trustee for investors' interests, in terms of a Trust Deed dated 5 April 2002, and acquired a general security agreement ("GSA") over the Company's assets. The Company obtained funding from the second respondent ("Fortress"), which also held a GSA over the Company's assets, by agreement with Perpetual in priority over Perpetual's GSA.

[9] Fortress subsequently alleged the Company was in breach of its facility, and appointed Grant Thornton principals as receivers to the Company's secured assets. After this Court dismissed the Company's challenge to that appointment, Perpetual appointed KordaMentha principals (the applicants in this proceeding) as second receivers to those assets. At the time of its receivership, the Company owed approximately $167m to some 7,500 investors. On the basis the Company was unable to pay its debts, the Registrar of Companies applied to put the Company into liquidation. This Court appointed the Official Assignee liquidator on 15 December 2009.

[10] By mid-2012, various developments had occurred. The Grant Thornton principals retired as receivers, leaving the KordaMentha principals as sole receivers with control of the Company's remaining assets. The Official Assignee issued proceedings against the Company's auditors, and the receivers issued proceedings

against each Perpetual and the Company's solicitors, each being claims made on the part of the Company (in liquidation and receivership). On issue of the proceeding against Perpetual, given the conflict of interest arising in remaining as trustee, the Public Trust was appointed as replacement trustee under the Trust Deed.

—consent orders

[11] In mid-2014, the Official Assignee, in negotiations including the auditors' insurer, settled the claim against the Company's auditors for payment of $18.5m ("including GST, if any"). The Official Assignee had 'preliminary advice' "the settlement had no GST consequences". On payment between the parties' solicitors, the auditors' insurer, which had been involved in the negotiations, sought the Official Assignee's confirmation he had received "our funds". The receivers claimed the fund, net of the Official Assignee's salvage costs, for investors. Fortress and Perpetual each also made claims of the fund under their respective securities.

[12] The receivers issued the present proceeding, seeking directions as to the validity, priority and amount of the various claims. They then negotiated the amount of salvage costs with the Official Assignee, and a maximum sum for each of their claims with Fortress and Perpetual. Ultimately, the receivers proposed the Official Assignee retain two "ring-fenced" funds of some $3.869m in respect of Fortress' claim, and $2.500m in respect of Perpetual's claim, pay himself some $2.349m "in resolution" of his salvage costs claim, and pay the balance of funds to the receivers. That was accepted by the parties, and this Court directed accordingly on 26 February 2015, by consent.

[13] The receivers later resolved Fortress' claim, and some of Perpetual's claim, with the result the Official Assignee only was required to continue to retain $1.75m in relation to the latter. The receivers and Perpetual agreed the originating application should be stayed in part, on condition the Official Assignee continue to retain $1.75m for Perpetual. The receivers and Perpetual had leave to progress that aspect of the originating application to hearing, if unable to resolve the remaining dispute arising in another proceeding. The Court made those orders also on 11 March 2015, by consent between the receivers and Perpetual. Then all parties sought consent orders

discontinuing the proceeding so far as it related to Fortress, which was to remain "on foot" for resolution of Perpetual's claim but stayed.[1] Those orders were made on 27 July 2015.

—potential GST liability

[14] In late 2016, through their respective solicitors, the receivers queried the Official Assignee's treatment of GST on the settlement with the Company's auditors. In particular, the receivers sought confirmation s 5(13) of the Goods and Services Tax Act 1985 – deeming GST payable on registered persons' receipt of payments from insurers – had been considered.

[15] The Official Assignee responded, as the Company's ordinary taxable activity was exempt from GST liability, so too was the settlement payment, as "consideration for [the Company's] normal taxable activity". By 'exempt', the Official Assignee meant the 1985 Act's specification of the provision of financial supplies as an exempt supply.

[16] But the Company had elected to be registered for GST,[2] and claimed refunds of input tax at a 60 per cent rate reflecting its mix of business and non-business lending. The receivers replied they considered such meant "[the Company's] lending activity involves making taxable (zero rated) supplies as well as exempt supplies". In another settlement for the Company involving a payment from an insurer, the receivers had agreed with the Commissioner of Inland Revenue GST should be paid on that settlement amount at the 60 per cent rate.

[17] The Official Assignee responded his advisors were unaware of the Company's GST election at the time of his settlement with the Company's auditors: "[a]s such, the impact of the election was not considered at that time". While the Official Assignee was 'surprised' the Company was permitted to make the election, he acknowledged its

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1 I have taken the view, as both parties are bringing applications, the stay consensually is lifted.

2 Specifically, notwithstanding the exempt status of financial services, the Company had elected under s 20F of the 1985 Act to be subject to s 11A (and s 20C), by which it would zero-rate (that is, charge GST at a rate of 0 per cent) its supply of financial services.

potential impact and "defer[red] to the Receivers to determine the appropriate GST treatment in light of [the Company's] GST election".

[18] The receivers raised the GST issue again directly with the Official Assignee in early 2017. At about the same time, through solicitors, the receivers advised the Official Assignee Perpetual's claim had settled without further claim on the retained funds, and sought to discontinue the balance of this proceeding by consent. Given the uncertainty over the GST liability, which the receivers advised they lacked funds to meet, the Official Assignee declined. The parties' solicitors briefly continued to correspond, without resolution.

[19] In June 2017, the Official Assignee sought the Commissioner of Inland Revenue's private binding ruling he carried out no taxable activity in the Company's liquidation, and no GST output tax arose from the settlement with the Company's auditors. He made voluntary disclosure to the Commissioner. But, on 7 December 2017, the Commissioner gave the Official Assignee notice of her proposed adjustment, to the Company's GST return made by the Official Assignee for the period encompassing payment of the settlement with the Company's auditors, to include the settlement sum. She proposed an additional $2.413m GST liability. An associated issue is if the Official Assignee is the Company's "specified agent" for the purposes of s 58 of the 1985 Act, meaning the Official Assignee would be treated as being the registered person carrying on the Company's taxable activities and liable accordingly. The Official Assignee initiated the statutory disputes procedure, which is continuing.

—the present applications

[20] In this proceeding, I am not required to, and do not, decide if the Official Assignee has any such liability. Instead I am to determine, on the Official Assignee's interlocutory application, if this Court's orders of 26 February and 11 March 2015 may be varied with effect to enable his resort to the balance of the fund held by him to meet any GST liability and his associated expenses, including in seeking such variation. Alternatively, I am to determine, on the receivers' originating application, if the balance of the fund should be paid to the receivers, in final disposition of the proceeding.

The relevant law

[21] Once a court has made an order, there is a significant policy reason for requiring the order to stand as conclusive, unless overturned on such challenge as may be available to affected parties. That reason is the principle of finality in litigation. It is not a principle of absolute finality, because it "accommodates exceptional situations by allowing final determinations to be revisited but within prescribed limits".[3]

[22] Thus a judgment only may be recalled before the orders it embodies are sealed,[4] and then only on constrained grounds.[5] Underpinning the policy is an expectation the orders reflect the court's reasoned judgment, arrived at by applying the law to the facts found by it. Errors in that finding, application, or reasoning may be susceptible to challenge. If not, or until successful challenge, the orders stand.

[23] Slightly different considerations arise when the court's orders are made by consent. To make allowance for the possibility, without the court's reasoned scrutiny of the relevant facts and law, the parties agreed to inappropriate orders, the court may set aside consent orders. Such is in exercise of this Court's inherent jurisdiction, in which it has "all, but only, such powers as are necessary to enable a court to act effectively and uphold the administration of justice within its jurisdiction".[6]

[24] It is well-settled I may set aside consent orders "in the interests of justice",[7] on some "good ground".[8] Although some analogy may be drawn from contractual principle, grounds on which a contract may be set aside are neither necessary nor sufficient to set aside consent orders.[9] But, as counsel for both parties accept, consent orders are "not easily disturbed",[10] and applications to set them aside are to be viewed

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3 *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 at [28].
4 High Court Rules 2016, r 11.9.
5 *Horowhenua v Nash (No 2)* [1968] NZLR 632 (SC) at 633.
6 *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441 at [114].
7 *Waitemata City Council v MacKenzie* [1988] 2 NZLR 242 (CA) at 249.
8 *Auckland Regional Services v Lark* [1994] 2 ERNZ 135 (CA) at 139.
9 *Aplin v Lagan* (1993) 10 FRNZ 562 (HC) at 568-569.
10 *Kain v Hutton* [2007] NZCA 199, [2007] 3 NZLR 349 at [230].

"with considerable caution".[11] It depends on what is required 'in the interests of justice' in all the circumstances of the case.[12]

Discussion

— 'varying' consent orders?

[25] As a starting point, I have some misgivings about whether my jurisdiction to set aside consent orders extends to a discretion to vary them, if by 'vary' is meant to hold the parties to some aspects of their agreement while changing others. The appellate authorities to which I have referred do not extend their explanations of the jurisdiction expressly to 'vary'.[13] The word appears first to be used without further explanation in description of the jurisdiction "to revoke or vary the order".[14]

[26] But my misgivings may be pedantic, once the extent of the inherent jurisdiction is understood. If a consent order may be set aside, the issues it resolved then again are at large. Effective administration of justice requires those issues to be addressed, even if only by revocation of the order. Any consequent order may be to adopt some or all of those measures agreed between the parties, supplemented by any others considered appropriate by the Court, as required by the interests of justice. From that perspective, the end result superficially may appear only to be the Court's variation of the parties' agreement. But whatever the Court's order – whether by consent, or in the Court's own judgement – it is still the Court's order, intended to achieve the Court's effective administration of justice. The parties' underlying agreement is not determinative, or disqualifying.

[27] From that perspective, I move to consider the grounds raised by the Official Assignee for my intervention.

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11 *Butcher v Finnigan* [2012] NZCA 250 at [6].
12 See *Kiriwai Consultants Ltd v Holmes* [2013] NZHC 3290 at [3]-[9] for an analysis of the caselaw.
13 See *Waitemata City Council v MacKenzie,* above n 7; *Auckland Regional Services v Lark,* above n 8; *Kain v Hutton,* above n 10; and *Butcher v Finnigan,* above n 11.
14 *Stead v The ship Ocean Quest of Arne* [1995] 3 NZLR 415 (HC) at 418.

—grounds for setting aside consent order

[28] The Official Assignee strongly asserts his recovery of the $18.5m settlement sum from the Company's auditors. He is justified in doing so. The settlement sum was, on any view, a very significant recovery, contributing a substantial portion of the money returned by receivers to investors. It was obtained on the Official Assignee's initiation of proceedings on the last day available to bring a claim based on the relevant auditors' report. Whether or not the receivers (knowing of the Official Assignee's intentions) otherwise may have pursued the claim, it was the Official Assignee that did, and at his considerable expense. The fact of that recovery entitles the Official Assignee in principle to "priority for the reasonable costs and expenses incurred in doing the necessary work" (as illustrated by the agreed $2.349m salvage costs).[15]

[29] That agreement arose from the Official Assignee's original August 2014 claim for $2.508m salvage costs "to 13 August 2014". The receivers scrutinised the Official Assignee's work records and raised queries about the content of the claim. In February 2015, the Official Assignee submitted an amended summary of the claim, still "to 13 August 2014", which the receivers accepted.

[30] Meanwhile, given the competing priorities asserted to the fund by Fortress, Perpetual and the Official Assignee, the receivers issued the present proceeding. In that context, the Official Assignee agreed this Court's directions as to those competing claims should be obtained. But he sought nonetheless "to resolve the issue of his reasonable costs". Absent resolution by agreement, he would seek approval of them by the Court.

[31] On agreeing the sum of the Official Assignee's salvage costs, the receivers proposed a draft memorandum in the terms later tendered by consent to this Court.[16] The memorandum recorded:

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15 Peter Blanchard and Michael Gedye *The Law of Private Receivers of Companies in New Zealand* (3rd ed, LexisNexis, Wellington, 2008) at [6.04], citing *Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298 at [19], [31] and [63]. See also *McKay v Johnson* [2016] NZHC 1691 at [56], citing *Stewart v Atco Controls Pty Ltd (in liq)* [2014] HCA 15, (2014) 252 CLR 307 at [22].

16 There were two consent memoranda: one between the receivers, Official Assignee and Perpetual; the other between the receivers and Fortress. The substantive difference between them – an increase in the 'ring-fenced' figure proposed for Fortress – is immaterial.

> The [receivers] and the Official Assignee have resolved the position on the Official Assignee's claim to the Fund. There is now no dispute between any of the parties about the Official Assignee's entitlement to part of the Fund.

and proposed the material directions:

> 5.1 the Official Assignee is directed to hold two separate funds drawn from the Fund (as defined in the interlocutory application) in respect of the second and third respondents' respective claims. Each fund will be:
>
> (a) "ring fenced" for the benefit of the relevant respondent's claim(s), so that each respondent has an amount of funds set aside exclusively for the purpose of meeting the respondent's claim(s) should that claim(s) be proved valid;
>
> (b) held by the Official Assignee until further order of the Court or agreement between the applicants and the relevant respondent;
>
> 5.2 The value of the two respondent funds held by the Official Assignee will be;
>
> (a) $3,[8]69,091.53 for Fortress's claims (or such other sum as the Court directs);
>
> (b) $2,500,000.00 for Perpetual's claims (as agreed between Perpetual and the applicants);
>
> 5.3 The Official Assignee is directed to pay:
>
> (a) The Official Assignee $2,349,329.28 from the Fund in resolution of the Official Assignee's Salvage Costs Claim (as defined in the Originating Application). [17]
>
> (b) The remainder of the Fund (other than the two respondent funds referred to in paragraph 5.2 above) to the applicants.
>
> 5.4 The Official Assignee will remain a party to the originating application:
>
> (a) but will abide further orders of the Court unless he notifies the Court otherwise; and
>
> (b) does not propose to have counsel appear further in the originating application unless directed by the Court otherwise.

[32] Those were the sealed orders made by this Court on 26 February 2015 (numbered 3.1 to 3.4). Notably, the Court's supplementary order of 11 March 2015 – reducing the Official Assignee's holding of Perpetual's fund to $1.750m, and staying

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[17] The originating application defined 'Salvage Costs Claim' as being "the actual costs of the claim against [the Company's] auditor".

the proceeding pending resolution of another proceeding (addressing the foundation for Perpetual's claim to the fund) – was made on a consent memorandum from solicitors only for the receivers and Perpetual.

[33] Later, on resolution of Fortress' claim, the parties filed a further joint memorandum dated 27 July 2015. The memorandum advised:

> The Official Assignee has no further claim to the Fund. However, as [the Company's] liquidators, the Official Assignee is required to remain party to this proceeding until all directions sought in relation to the Fund have been resolved.
>
> As set out in the Court's order on 26 February 2015, the Official Assignee has agreed to abide the orders of the Court.

and sought orders:

> 14.2 The claim between the applicants and Fortress is discontinued, with no issue regarding costs;
>
> 14.3 The proceeding remains on foot in order for Perpetual's Court Costs claim to the Fund to be resolved; and
>
> 14.4 The proceeding shall remain stayed pending resolution of a separate proceeding, CIV-2012-404-4602.

Those orders were made the same day.

[34] Those repeated assertions by the Official Assignee he had no further salvage costs claim obviously were made well in advance of the Commissioner of Inland Revenue's proposed adjustment. But Mr Gudsell submits the Official Assignee "acted appropriately in determining whether GST was payable in relation to the Settlement Funds". He had preliminary advice the settlement had no GST consequences and, even it was, the settlement sum was inclusive of any GST liability. He had not required to revisit that preliminary advice, because "[his] 'OASIS' internal case management system recorded, incorrectly, that the Company had been de-registered for GST". That incorrect information was said to have been provided by the Inland Revenue Department, on the Official Assignee's advice of his appointment as the Company's liquidator.

[35] I accept the Official Assignee has 'thousands' of active insolvencies, for which he reasonably may rely on OASIS as providing accurate information. And I accept the

sources of that information include records provided by the Inland Revenue Department, entered into OASIS by the Official Assignee's staff.

[36] But I am not satisfied with Mr Gudsell's submission for at least three reasons. First, the 'preliminary advice' only was recorded in writing some two years later, in response to queries from the receivers' solicitors, although the Official Assignee accepted under cross-examination the advice he sought and received "verbally on the day of the settlement" then accurately was recorded. No evidence was forthcoming from the Official Assignee's advisors as to the foundation for that advice. But it was based on the advisor's comprehension "the settlement reached dealt with claims in negligence for loss, rather than claims directly related to any taxable supply". Notably, the advisor was not relying on financial services being an exempt supply under the 1985 Act, or the Company's GST status being cancelled, and still less the actual facts of the Company's position.

[37] Second, the 'facts' as they were recorded in OASIS relevantly only specified the Company's GST status was "Cancelled", one of a number of choices selectable from a drop-down box in OASIS's interface. The Official Assignee could not explain, in answer to questions from me, what other choices existed. The receivers' senior counsel, Bruce Stewart QC, described 'Cancelled' as meaning 'deregistered', which the Official Assignee accepted. The "GST Cancelled Date" field was empty, meaning there could be no certainty as to when such cancellation had occurred. Confusingly, the OASIS "GST Number" field continued to be populated, albeit (as is usual) by the same number as appeared in its "IRD Number" field.

[38] None of that is fatal to reliance on the Company's OASIS record. But OASIS's audit trail of all interactions with the Company's record illustrates – despite commencement of the Company's liquidation on 15 December 2009, and creation of the Company's OASIS record the following day – entry of the Company's IRD and GST numbers did not occur until over a year later, on 7 January 2011. The Official Assignee explained, at that time, such a delay was not unusual. Yet entry of the Company's 'cancelled' GST status did not occur until 17 May 2013. The Official Assignee staff member who entered those details could not find "any documents or correspondence to explain why". But there may be a presumption available, as a matter

of administrative regularity, the details were entered from information supplied by the Inland Revenue Department.

[39] That still does not explain the more than two-year gap between the Department's provision of IRD and GST numbers, and its advice of GST deregistration. Given the Company had been in liquidation since 2009, and the Official Assignee had not moved to deregister the Company, any information of its deregistration presumably would have been available at the time of the Department's provision of the Company's IRD and GST numbers (and presumably omitting the latter). And there is a further curiosity: the Company's OASIS record creates an "Estate Number", provided to the Department. But the Department's records connect that estate number to a different (but related) entity: Capital + Merchant Investments Limited ("CMI"), which was removed from the Register of Companies on conclusion of its liquidation on 22 January 2013. Mr Gudsell concludes "it is likely IRD incorrectly provided information in relation to CMI". Yet a contemporaneous Court of Appeal judgment recorded "CMI was a finance company which was not registered for GST because it provided GST exempt supplies as a provider of financial services".[18]

[40] Those inconsistences may provide a basis to rebut any presumption about OASIS's reliability. But it does not matter, because there is no evidence the Official Assignee actually had regard for the Company's GST status at the time of settling with the Company's auditors, or when formalising that settlement. The Official Assignee's affidavits carefully do not say he or his staff had such regard – only that had they done so, they would have been misinformed by the OASIS record:

> [W]hen it *did* become necessary for the Official Assignee to consider the Company's GST registration, in settling the Auditor Claim, the OASIS system recorded that the Company was no longer registered for GST. I consider it was reasonable for my staff to rely on information they understood was provided by the IRD…. (Original emphasis.)

[41] I specifically took the Official Assignee to the audit trail of his own interactions with the Company's OASIS record on 13 June 2014 – precisely at the outset of negotiations, culminating in settlement of the claims against the Company' auditors on 25 June 2014 – but he denied looking at the GST status field. He said in cross-

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[18] *Simpson v Commissioner of Inland Revenue* [2012] NZCA 126, [2012] 2 NZLR 131 at [4].

examination a staff member advised him OASIS recorded the Company's GST status as cancelled, and he thought that advice came "between the negotiation day and the subsequent consideration of the settlement deed draft and its completion".

[42] But the OASIS audit trail shows no-one else interacted with the Company's record between 14 October 2013 and 15 July 2014. Any advice of the Company's GST status cancellation can only have been on the staff member's memory of the OASIS record from some inspection more than eight months previously. I find it more likely, throughout the period of settlement negotiations, the Official Assignee proceeded on the basis the settlement itself had no GST consequence, as was his preliminary advice, not revisited.

[43] A third reason to reject the submission the Official Assignee acted appropriately in determining if GST was payable on the settlement is, on the "inclusive of GST, if any" formulation of the settlement, the question remained live for his determination in relation to a GST return for the period in which the payment was received. But there is no evidence the Official Assignee had any regard for the Company's obligation to return GST. There is no evidence he sought any timely advice on the point. His preliminary advice the settlement had no GST consequence was not a sufficient basis on which to disregard the Company's tax obligations.

[44] The Official Assignee's affidavit evidence was his office undertook enquiries of the Company's GST status at the time of his appointment as liquidator, "similar" to those undertaken by the receivers of the Company's accountants, Grant Thornton (the first receivers), and the Official Assignee. But, on my specific questions of him, the Official Assignee accepted that was only advice of his appointment as the Company's liquidator to the Commissioner, giving rise to the Commissioner's provision of the Company's IRD and GST numbers a year later, and of its GST cancellation over two years later still.

[45] In other words – for the first three and a half years of the Company's liquidation, including when the proceeding was issued against the Company's auditors – the Official Assignee only had information suggesting the Company was a registered person. Even if there was no reason during that period to query the Company's GST

status, it is misleading to suggest such enquiries were undertaken "upon the Official Assignee's appointment as liquidator".

[46] A significant amount of expert opinion evidence addressed Mr Gudsell's further submission, if additional legal advice had been sought about the Company's GST liabilities, the Official Assignee "would still have concluded that GST was not payable".

[47] Robin Moncrieff Oliver, a tax advisor and formerly Deputy Commissioner of Inland Revenue, was of the opinion – as the settlement payment was to be regarded purely compensatory – it was not made in consideration for any underlying supply of services subject to GST. In his opinion, it was not intended s 5(13) of the 1985 Act – deeming GST payable on payments from insurers – changed that policy. But he also considered the subsection was "confusing", "very awkward", and "ambiguously worded". Last, he thought it was "unclear" and "at least arguable" if the Official Assignee received the payment as part of any taxable activity, or if the payment related to a loss incurred in that taxable activity.

[48] I am not prepared to engage in any detailed consideration of Mr Oliver's opinion. To do so is to risk inadvertently making findings that may be influential in the Official Assignee's tax dispute. But, even on Mr Oliver's own evidence, it cannot be thought the Official Assignee would have obtained unconditional advice GST was not payable. Mr Oliver's dismissal of any material risk from the position he advocated was not convincing. The Official Assignee described his own office as "treat[ing] GST [liability] very conservatively", which suggests any uncertainty as to such liability would have taken him to a conclusion opposite to that urged by Mr Gudsell.

[49] For all these reasons, the Official Assignee cannot argue for any 'mistake' in connection with his acceptance of the receivers' proposed consent orders. In entering the settlement agreement with the Company's auditors, he simply did not have regard for the Company's GST status at all. Thus he did not turn his mind to whether he may incur salvage costs in addition to those agreed with the receivers.[19]

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[19] *The New Zealand Refining Co Ltd v Attorney-General* (1993) 15 NZTC 10,038 (CA) at 10,051-10,052.

[50] The Official Assignee complains the receivers did not bring the GST issues to his attention at the time of their scrutiny of his office's work records. But the receivers say the information they reviewed was of the Official Assignee's own costs and expenses, as expected, without reference to any GST component – as may have been levied, for example, on supplies from third parties. The Official Assignee's own 4 December 2014 report of the settlement as his "receipt of an ex gratia payment in the sum of $18.5m, with no admission of liability from the company auditors" made no mention of its GST-inclusive formulation. The settlement agreement was not disclosed to receivers until discovery in the present proceeding.

[51] Neither did the receivers labour under any mistake: they requested quantification of the Official Assignee's salvage costs claim; that was proffered, negotiated, and agreed. They emphasise none of the conditions for relief from a contractual mistake – acceptance of the proposed consent orders being influenced by a mistake, resulting in a substantially unequal exchange of values, without assumption of risk by the Official Assignee – can be made out.[20] Given I have found there was no mistake, I need not to address those factors. But I take the view both the Official Assignee and the receivers were influenced to accept the proposed consent orders as completely addressing the Official Assignee's salvage costs claim, as it did. Thus there was no unequal exchange of value. And it was a choice for the Official Assignee to present his claim without any contingency, as he did.

—the object of the consent orders

[52] It is quite clear from the evidence the Official Assignee was incentivised to quantify and recover his salvage costs from the settlement payment. Fortress and Perpetual also were incentivised to ensure their claims, if made out, could be recovered from the payment. And the receivers were incentivised to recover to investors as much money as was available, before concluding the receivership. There is no evidence from those ultimate beneficiaries, but presumably they wished to minimise their losses. These are all the interests affected by the orders when made.

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[20] Contract and Commercial Law Act 2017, s 24.

[53] As early as 19 June 2014, the receivers asserted any settlement payment was the Company's asset, to which "debenture holders have a better interest …, less the direct and agreed recovery costs that the Official Assignee is entitled to". On 19 August 2014, the Official Assignee provided the receivers with a summary of his $2.508m "cost of administration to 13 August 2014".

[54] In subsequent correspondence, the receivers emphasised their wish "to get an interim dividend to the Company's investors" and acknowledged the Official Assignee's "concern about being exposed to risk for claims against the fund which have been advised to you". The receivers proposed the Official Assignee:

> … put aside sufficient funds to meet those claims along with a contingency fund to allow you to meet any costs you might incur while the claims are determined and pay the balance to us.

The Public Trust, as trustee, supported that proposal.

[55] By letter of 22 October 2014, the Official Assignee updated his salvage costs to some $2.512m (but still to 13 August 2014), and sought the receivers' "written confirmation that the Official Assignee is authorised to deduct the salvage costs from the funds held". He proposed the Court's directions be sought to approve those costs, and separately to determine competing claims to the fund (and who should hold it in the interim), but preferred the former be agreed with the receivers.

[56] When the receivers issued this proceeding, the Official Assignee emphasised to them "[his] concern is to resolve the issue of his reasonable salvage costs". So far as his retention of the fund was concerned, he pointed out the fund was held "subject to competitive interest rates and, significantly, the interest earned is not subject to withholding tax". He suggested the receivers may consider "there are benefits in maintaining" the fund with him. The receivers responded they "intend to attempt to resolve all outstanding issues around the Official Assignee's salvage costs by agreement with [him]".

[57] The receivers then agreed those costs at $2.349m, and provided the draft consent memorandum for the Official Assignee's approval, as occurred. As I have noted, the joint memorandum recorded "resolution" of "the position on the Official

Assignee's claim to the Fund", and advised "[t]here is now no dispute between any of the parties about the Official Assignee's entitlement to part of the Fund".

[58] The consent orders are structured such that the Official Assignee's retention of funds in respect of the Fortress and Perpetual claims was "exclusively for the purpose of meeting the respondent's claim(s) should that claim(s) be proved valid". The Official Assignee was to retain the funds "until further order of the Court or agreement between the applicants and the relevant respondent". The omission of the Official Assignee from that agreement is notable. But for payment of his own salvage costs "in resolution of the Official Assignee's Salvage Costs Claim", the Official Assignee was directed to "pay … the remainder of the Fund (other than the two respondent funds …) to the applicants".

[59] The clear intention of the parties was – after payment of the Official Assignee's agreed salvage costs, and subject to court order or agreement between each Fortress or Perpetual and the receivers as to disbursement of their respective funds held by the Official Assignee – the whole of the balance of the fund was to be paid to the receivers, without requirement for any further agreement with the Official Assignee. Hence the Official Assignee accepted he would remain a party to the proceeding, but would abide further orders of the Court, and not further appear on the originating application (although he did so in relation to Fortress' discontinuance, emphasising in that consent memorandum "[he] has no further claim to the Fund").

[60] The reduction of the Official Assignee's retention for Perpetual was achieved by agreement between the receivers and Perpetual alone. Although the evidence is unclear, I infer the Official Assignee paid the excess of his Perpetual retention to the receivers, as then being part of that balance to which the receivers were entitled by the consent orders. Now Perpetual has disclaimed entitlement to the remainder of the retention, the consent orders' inferred mechanism should operate to require the Official Assignee to pay that last $1.75m to the receivers. The 'exclusive' reason for the Official Assignee's retention no longer exists.

—the interests of justice

[61] What then are the interests of justice in the Official Assignee now having resort to the remaining $1.75m for its further expenses?

[62] But for "resolution" of any claim to the Official Assignee's "actual costs", it seems likely any liability the Official Assignee has to return GST on the settlement payment would qualify for priority against those proceeds. The Official Assignee is not indemnified against such liability.[21] Whether priority also would be available for any penalties or interest incurred by the Official Assignee is less clear, because incurring such may not be a 'reasonable cost or expense incurred in doing the necessary work'.[22] Cost or expense incurred in unsuccessfully resisting any such liability may only be 'reasonable' or 'necessary' in marginal cases. But the reasonable cost and expense of successful resistance may be seen analogously with allowable 'preservation costs'.[23] Thus the Official Assignee's actual resort to the fund would have to await the result of the statutory dispute process, to determine the qualifying reasonableness and necessity.

[63] Investors could have no expectation to recover the retained funds until the claims made to them were resolved. No difference to their position is made if the Official Assignee's contingent claim is substituted for that resolution. The receivers' interest in the retained funds is wholly derivative. But the receivers and the Official Assignee intended the consent orders to establish a regime that gave finality to disposition of the fund. That was four years ago. The Company has been in receivership now for over eleven years. The consent orders require the Official Assignee's payment of the remainder as soon as others' claims to the retentions were resolved, to permit conclusion of the receivership; neither the orders nor the parties

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21 By memorandum I sought of him at the conclusion of the hearing, Mr Gudsell advises there is no specific fund for such indemnity; resort cannot be made to the Liquidation Surplus Account established under s 316 of the Companies Act 1993, because such liability is not "the claims of the creditors of a company in liquidation" in terms of s 316(4)(b); the Official Assignee's immunity from personal liability under s 86 of the State Sector Act 1988 does not extend to his responsible Ministry, the Ministry of Business, Innovation and Employment ("MBIE"); MBIE's professional indemnity insurer has been notified, but will not determine its response until the substantive GST dispute is resolved; and, if insurance is declined, the Official Assignee would seek government funding for that liability, by way of a one-off appropriation to use public funds.

22 See Blanchard and Gedye, above n 15.

23 See *Buchler v Talbot*, above n 15, at [63].

anticipated any further interceding claim, and certainly not of the uncertain quantum raised by the Official Assignee.

[64] Thus the key issue is whether that final disposition should be interrupted, in the interests of justice. It is consensual finality, which anticipates well-resourced and advised parties are to be taken to have had regard for their own interests in reaching agreement, on which courts generally will not permit revisitation.[24]

[65] The factors relied upon to disturb that finality arose afterwards: the Official Assignee's belated apprehension of his own prospective GST liability, and his fortuitous possession of a sum to which he might resort to recover any reasonable costs or expenses then necessarily incurred. But the foundations for that liability – the Company's GST registration; its election to zero-rate its supply of financial services; its auditor's insurers' involvement in the settlement; and the Official Assignee's obligations as the Company's specified agent for the purposes of the 1985 Act – were capable of being known in advance of agreement to the consent orders.

[66] The context for assessing these circumstances is of a liquidator conducting itself reasonably and efficiently,[25] with the high standard of care and diligence expected of a liquidator as a professional person who is being paid for his or her services,[26] "that degree of skill and care which, by accepting office, he has held himself out as possessing".[27]

[67] William Guy Black, an accountant with substantial insolvency experience, gave expert evidence "it is essential [a liquidator] give due consideration to GST … to first understand the GST status of the company". He added "for finance companies specifically it will be essential to understand whether the supplies it makes are exempt, or zero rated, or possible a combination of both". Thus he noted:

> A liquidator would usually make enquiries as to the GST status of the company soon after appointment. In my experience a liquidator will write to the Inland Revenue Department, advising of the liquidation appointment and seeking

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24 *Hildred v Strong* [2007] NZCA 475, [2008] 2 NZLR 629 at [46].
25 Companies Act 1993, s 253.
26 *Re Windsor Steam Coal Co Ltd* [1929] 1 Ch 151 at 165.
27 *Insolvency Law & Practice* (online ed, Thomson Reuters) at [CA253.02(2)], citing J O'Donovan *McPherson: The Law of Company Liquidation* (3rd ed, Law Book Co, Sydney, 1987) at 218.

> information in relation to the amounts owed by the Company in respect of outstanding taxes, including GST. In addition a review of the books and records of the company, including its financial statements, or enquiries of the company's accountants or tax advisors, will usually confirm whether or not a company is registered for GST.

[68] The Official Assignee agreed with Mr Black's propositions and added "[those] enquiries were undertaken by my staff". However, as I have noted, that only was true of the Official Assignee's advice to IRD of his appointment as liquidator.[28] I apprehend the practice between those two entities was then for the IRD to supply some foundational information, such as the Company's IRD and GST numbers, as occurred. The balance of commended enquiries was not undertaken by the Official Assignee

[69] As I also have noted, for the first three and a half years of the liquidation, the Official Assignee had information (the Company's putative GST number) indicating the Company was GST-registered.[29] He had not become aware of the Company's 2004 election to zero-rate its supply of financial services "until early in 2017". Although the Official Assignee replied "my staff understood from the OASIS system that the Company had been deregistered for GST purposes from May 2013", that is wrong.

[70] Only the cancellation entry in OASIS was made in May 2013. No GST status cancellation date was provided by the IRD; the IRD's advice was far from contemporaneous; and, in May 2013, the Company was in liquidation, meaning it would have been the Official Assignee who cancelled the Company's GST status. Throughout the liquidation, the Official Assignee's OASIS record maintained a GST number for the Company. So far as the Official Assignee's information was concerned, at the time of his June 2012 claim against the Company's auditors, it showed the Company to be GST-registered.

[71] The complications of the Company's OASIS record – possibly being information of another (albeit related) company – are not decisive: even if GST status 'cancelled' means 'deregistered', the absence of any cancellation date and the continued presence of a GST number invited inquiry, as did the timing of the advice of cancellation. Such enquiry should have identified the mistaken information. And,

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28 At [44] above.
29 At [45] above.

as I have found on the balance of probabilities, the Official Assignee proceeded on the basis the settlement payment itself had no GST consequence, meaning the Official Assignee gave no regard to the Company's GST status, and thus its potential consequences were not engaged. But the Official Assignee plainly had not taken any steps to 'first understand' the Company's GST status, at the commencement of either the liquidation (as is commended, and accepted, good practice), or even the proceeding against the Company's auditors.

[72] Because the Official Assignee, with the exercise of expected care and diligence, could properly have informed himself of the prospective GST consequences of the settlement payment, he could also have made allowance for that contingency in his retention of part of the payment. That was, after all, precisely what he was invited to do by the receivers. But the Official Assignee preferred to quantify his costs at the time, and to be paid them, expressly resolving his claim and leaving him with "no further claim to the Fund". The consent orders embed that preference.

[73] Setting aside the consent orders – to enable the Official Assignee to exercise his priority to such further reasonable and necessary costs and expenses he may incur, in belated comprehension of his contingent liability – is precisely to allow him the 'second bite at the cherry' so decried by the Court of Appeal.[30] The interests of justice – informed by the standard of performance expected of the Official Assignee as liquidator, and accepted by him as his obligation – do not require it. They are better served by enforcing the consent orders, as the receivers effectively seek.

—the receivers' amended originating application

[74] However, the relief sought by the receivers is not expressly to enforce the interlocutory orders 3.1(b) and 3.3(b). The effect of those orders is, respectively, the Official Assignee's holding of the $1.75m fund has been surpassed by the agreement between the receivers and Perpetual the latter has no claim to the fund, with the consequence the Official Assignee must pay the remainder of the fund to the receivers.

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30 *Hildred v Strong*, above n 24, at [46].

[75] Instead, the receivers seek, by way of amended originating application, directions under s 34(1) of the Receiverships Act 1993 and/or s 284(1) of the Companies Act 1993:

> 1.1 the first respondent has no further claim or entitlement to any of the remaining balance of the fund held by the first respondent under directions previously given in this proceeding (the Fund);
>
> 1.2 the first respondent shall immediately pay to the applicants the whole of the remaining balance of the Fund (including accrued interest), free and clear of any claim by the first respondent…

[76] The receivers have leave to seek directions under s 284.[31] There I may "give directions in relation to any matter arising in connection with the liquidation". On a receiver's application under s 34(1), I may "give directions in relation to any matter arising in connection with the performance of the functions of the receiver". Piquantly for the Official Assignee's application, I also may "revoke or vary any such directions" (including on a liquidator's application under s 34(3)(f)). The last is an indication any direction given in a receivership is not conclusive, possibly unless its revocation or variation is denied. But the reservation does not make any in-road into the law on setting aside consent orders, which is predicated on holding parties to their agreement, except on good grounds in the interests of justice.[32]

[77] There can be no doubt the validity of any person's claim to an interest in the property in receivership is a matter in relation to which directions may be given under s 34.[33] I prefer to address the receivers' application under that head, as being more directly engaged by the outcome. The effect of the consent orders, as I have found, are to leave the Official Assignee with no further claim to the balance of the settlement payment retained by him. I am satisfied the Official Assignee should pay that balance to the receivers to enable them to complete performance of their functions.

Result

[78] The Official Assignee's interlocutory application dated 29 March 2018 is dismissed.

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31 Minute, 13 February 2015.
32 See [21]-[24] above.
33 See *McKay v Toll Logistics (NZ) Ltd* [2010] 3 NZLR 700 (HC) at [2] and [47].

[79] The receivers' amended originating application dated 20 February 2018 – except as to costs, which I address below – is granted.

Costs

[80] As the successful party in resisting the Official Assignee's interlocutory application, the receivers are in principle entitled to their costs.

[81] However, although the successful party on their originating application, such was a precautionary measure, obtaining the receivers the statutory defence afforded by s 34(6). Analogously to obtaining an indulgence from the Court,[34] I take the initial view the receivers should bear their own costs on the originating application. I recognise they may be reimbursed from the fund. I do not consider the Official Assignee's opposition, in support of his interlocutory application, is such as entitles him to costs on that application.

[82] As to costs on the interlocutory application, in my preliminary view, the Official Assignee should be liable to pay the receivers 2B costs and disbursements. That is because, from what I presently know of it, nothing in the steps taken by the receivers on the interlocutory application in this averagely complex proceeding required other than a normal amount of time.

[83] If those views are not accepted by either party, and costs cannot otherwise be agreed between them, costs are reserved for determination on short memoranda of no more than five pages – annexing a single-page table setting out any contended allowable steps, time allocation, and daily recovery rate – to be filed and served by:

(a) the receivers within ten working days of the date of this judgment;

(b) the Official Assignee within five working days of service of the receivers' memorandum; and

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[34] *Cunningham v Butterfield* [2014] NZCA 213, (2014) 22 PRNZ 521 at [57].

(c) the receivers strictly in reply within five working days of service of the Official Assignee's memorandum.

—Jagose J